

DOCUMENT RESUME

03605 - [A2513654]

[Disposition of Retainage Remaining as the Final Balance Due under a Contract in View of Three Conflicting Claims]. B-189679. September 7, 1977. 2 pp.

Decision re: Larry T. Smith, Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government (806).

Organization Concerned: Internal Revenue Service; National Park Service; Rocky Mountain Regional Office; Northwestern National Insurance Co.; Small Business Administration.
Authority: Miller Act (40 U.S.C. 270 (a)). B-181695 (1975). E-188473 (1977).

The Authorized Certifying Officer for the Rocky Mountain Regional Office of the National Park Service requested a decision as to the disposition that should be made of the retainage remaining as the final balance due under a contract in view of three conflicting claims. The Miller Act surety who completed the contract upon the default of the contractor was entitled to reimbursement, free from setoff, of the withholding taxes for which the performance bond was liable. The claim based on expenditures under the payment bond was subject to the Government's right of setoff for debts of the contractor. The Internal Revenue Service's request for offset should be given priority over the indebtedness to the Small Business Administration on the basis of perfected security interest in the contractor's receivables. (Author/SC)

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-189679

DATE: September 7, 1977

MATTER OF: Larry T. Smith, Inc.

DIGEST:

1. Miller Act Surety who completed contract upon default of contractor is entitled to reimbursement, free from setoff, of withholding taxes for which performance bond is liable, if surety pays or has paid taxes; however, claim based on expenditures under payment bond is subject to Government's right of setoff for debts of contractor.
2. As between tax indebtedness to IRS and indebtedness to SBA on basis of perfected security interest in contractor's receivables assigned by bank to SBA, IRS request for offset should be given priority, since taxes were assessed months before bank assignment to SBA.

By letter dated July 18, 1977, the authorized certifying officer, Rocky Mountain Regional Office, National Park Service (NPS), Department of the Interior, requested a decision as to the disposition that should be made of the \$26,039 retainage remaining as the final balance due under contract No. CX-1200-4-0009 with Larry T. Smith, Inc., in view of three conflicting claims.

The contract was terminated for default on May 13, 1976. Northwestern National Insurance Company (Northwestern), the contractor's surety on the payment and performance bonds furnished under the Miller Act, 40 U.S.C. § 270(a) (1970), completed the contract work. The surety asserts a right to the \$26,039 balance in view of claims pending and paid under the payment bond for labor and material furnished under the defaulted contract in excess of that amount and a Miller Act claim by the Internal Revenue Service (IRS) in the amount of \$19,316.27 for unpaid withholding taxes due on wages paid under the defaulted contract.

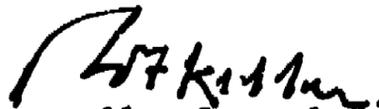
IRS has indicated that the contractor has a tax indebtedness to the United States of more than \$93,000 plus interest and taxes. IRS has filed with NPS a "notice of levy" for \$49,394.88 and a "request for offset" of \$44,504.15. On that basis, IRS claims the contract balance.

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The Small Business Administration (SBA) claims the contract balance on the basis that, as a holder of a perfected security interest in the contractor's receivables assigned to it by the Bank of Fountain Valley, the contractor is indebted to it in the amount of \$186,723.41 plus interest.

Section 1 of the Miller Act, as amended, 40 U.S.C. § 270a(d) (1970), requires every performance bond to "specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished." A surety which pays the withholding taxes required to be paid under the performance bond is entitled to be reimbursed the amount of those taxes free from setoff for the contractor's debts. United States v. United States Fidelity and Guaranty Company, 328 F. Supp. 69 (E.D. Wash. 1971), affirmed, 477 F.2d. 567 (9th Cir. 1973). Northwestern is therefore entitled to be paid \$19,316.27 of the contract balance provided it pays or has paid the withholding taxes due. However, the surety's claim based on the expenditures made pursuant to the payment bond is subject to the Government's right to setoff for the debts of the contractor. Evergreen Engineering, Inc., B-181695, April 7, 1975, 75-1 CPD 211; Bonneville Power Administration, B-188473, August 3, 1977.

The contractor's liability to the Government more than covers the funds remaining after the payment of the \$19,316.27 amount. As between IRS and SBA, the IRS request for offset should be given priority, since the taxes were assessed months before the bank assignment to the SBA on December 4, 1975.


Deputy Comptroller General
of the United States